

This letter sets out how a standard drop shipment is treated in Illinois for Retailers' Occupation Tax and Use Tax purposes. See, 86 Ill. Adm. Code 130.325 (This is a GIL).

May 31, 2002

Dear Xxxxx:

This letter is in response to your letters of March 17, 2002 and April 25, 2002 and our recent telephone conversation. The nature of your letters and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be accessed at the Department's Website at <http://www.revenue.state.il.us/Laws/regs/part1200/>.

In your March 17, 2002 letter, you have stated and made inquiry as follows:

AAA is a building manufacturer with plants located throughout the United States. We are a registered retailer in the state of Illinois and are required to collect sales/use tax in your state. We have acquired several customers recently that purchase buildings from us and then resell the buildings to a third party through their website on the Internet. Frequently, we are presented with the debate that since the buildings are being sold online, sales tax will not apply to the transaction. Our argument for charging applicable sales tax is that the sale between AAA and our customer is not made online. Therefore, since we have nexus (due to having either a plant or sales representation) in the state of Illinois, sales tax would be due on the transaction.

The following questions have been presented in regards to the above situation:

- When presented with the conditions outlined above, are we correct in stating that we are required by the laws in your state to collect the appropriate sales/use tax that would be due on this type of transaction?
- Are there any bills pending in your legislature that may alter your determination if signed into law?
- If we are presented with a letter from our customer, on their company letterhead, stating that they would pay all applicable sales taxes, penalties and interest if it is later determined in an audit that the tax was due on the transaction, would our obligation to collect the sales tax at the time of the sale be satisfied?

So that we can better serve our customers and the state of Illinois, please provide a written ruling on the above questions as soon as possible. We have several orders pending at this time that need these issues resolved before we will be able to proceed

with the fabrication of the building. If possible, please fax your response to my attention. Otherwise, please mail your response to the address above.

In your April 25, 2002 letter, you have stated and made inquiry as follows:

AAA is a building manufacturer and a registered retailer in the state of Illinois. We are required to collect sales/use tax in your state. We have a customer that is located in STATE that is purchasing a building from us. This STATE customer has requested that we ship this building via common carrier to his customer who is located within the state of Illinois and drop-ship the building at the Illinois jobsite (third-party drop shipment transaction). Our STATE customer is not registered in the state of Illinois.

Will the state of Illinois accept our customer's STATE number or does Illinois require anyone doing business in your state to register for sales tax? If Illinois will accept the STATE customer's number, what documentation will be required for our files to support this exemption?

Also, quite often, we have the exact same transaction as described above, but the STATE customer will retain the common carrier, send it to our plant to pick up the building, then deliver the building to the end-user in Illinois. Does the tax liability remain the same in this transaction? If not, where does the tax liability occur?

So that we may better serve our customers and the state of Illinois, please provide a written ruling on the above questions as soon as possible. You may mail your response to my attention at the mailing address shown above or e-mail. Thank you.

Due to the limited amount of information in your letters, we have had to make several assumptions to make a response. We assume that you sell tangible personal property to your customer who will in turn sell the building as tangible personal property to its customer. If your customer has a contract to furnish and install the building (e.g. permanently affix to real estate) it would act as a construction contractor and our conclusions would be different. See, 86 Ill. Adm. Code 130.1940 and 130.2075.

In the scenario set out in your April 25 letter you have described a drop-shipment situation that is the subject of 86 Ill. Adm. Code 130.225, enclosed. AAA as a seller (company) makes a sale to an out-of-State purchaser (B) and drop-ships the items to B's customer (C) located in Illinois. AAA as seller has nexus with Illinois sufficient to require it to collect Use Tax on tangible personal property delivered to Illinois locations and AAA is registered with Illinois. Also, purchaser B is not registered with Illinois.

As a seller required to collect the Illinois Tax, AAA must either charge tax or document an exemption when it makes a delivery in Illinois. In order to document the fact that the sale to B is a sale for resale, AAA must obtain a valid Illinois Certificate of Resale from its purchaser (B). Because the sale involves a delivery to an Illinois location, the Certificate of Resale must be valid in Illinois and contain the items of information listed in 86 Ill. Adm. Code 130.1405(b), enclosed. If purchaser B does not provide acceptable Illinois documentation, AAA will be required to charge and collect tax from B on AAA's gross receipts from the transaction.

If B has no nexus whatever with Illinois, it is unlikely that it will be registered with Illinois. If that is the case, and if B has no contact with Illinois which would require it to be registered as an out-of

State Use Tax collector for Illinois, then it could obtain a resale number which would provide it the wherewithal to supply a required number to AAA in conjunction with a Certificate of Resale. We hope the following descriptions of out-of-State Use Tax collectors and persons who qualify for resale numbers will be useful.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by purchasers.

So long as B does not accept purchase orders in Illinois, and so long as the items it sells are not located in its Illinois inventory when it sells them, it need not register as a retailer.

Out-of-State sellers who fall under the definition of a "retailer maintaining a place of business in this State" (see 86 Ill. Adm. Code Sec. 150.201(i), enclosed), must register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department. See 86 Ill. Adm. Code Sec. 150.801(c), enclosed. The retailer must collect and remit Use Tax to the State on behalf of his Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The U.S. Supreme Court in *Quill v. North Dakota*, 112 S. Ct. 1902 (1992) set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a state's tax laws. The Supreme Court set out a two-prong test for nexus.

The first prong is whether the Due Process Clause is satisfied. Due process will be met if the person or entity intentionally avails itself of the benefits of an economic market in a forum state, *Quill* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative, and it is immaterial for tax purposes that the representative's presence is temporary. The vendor's delivery of his product on a repetitive basis will trigger Use Tax collection responsibilities. See *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 310 (1996).

If B has no contact with Illinois, it does not fall within the definition of a "retailer maintaining a place of business in this State", and it need not register as an out-of-State Use Tax collector.

Resale numbers are issued to persons who make no taxable sales in Illinois but who need the wherewithal to provide suppliers with Certificates of Resale when purchasing items which will be resold. So long as B does not act as an Illinois retailer and so long as it does not fall under the definition of a "retailer maintaining a place of business in this State", its sales to Illinois customers are not subject to Illinois Retailers' Occupation Tax liability and it cannot be required to act as a Use Tax collector. So long as this is true, it qualifies for a resale number which does not require the filing of tax returns with the Department. Information about acquiring a resale number can be obtained by calling the Department's Central Registration Unit at (217)-785-3707.

Please note that the fact that B may not be required to act as a Use Tax collector for Illinois does not relieve its Illinois customer C of Use Tax liability. Therefore, if B does qualify for a resale number, C would have to pay its tax liability directly to the Illinois Department of Revenue.

Section 2c of the Retailers' Occupation Tax Act contains the following provision that would allow "other evidence" to be submitted by a purchaser to document the fact that its sale is for resale:

"Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale." 35 ILCS 120/2c

In light of this statutory language, certifications from purchasers on Certificates of Resale in lieu of resale numbers that described the drop-shipment situation and the fact that purchasers have no contact with Illinois that would require them to be registered and that they choose not to obtain Illinois resale numbers would constitute evidence that this particular sale is a sale for resale despite the fact that no registration number or resale number is provided. The risk run by companies in accepting such a certification and the risk run by purchasers in providing such a certification is that an Illinois auditor is much more likely to go behind a Certificate of Resale that does not contain a valid resale number and require that more information be provided by companies as evidence that the particular sale was, in fact, a sale for resale. See 86 Ill. Adm. Code 130.225(d).

In our recent telephone conversation you said the transactions about which you made inquiry in your March 17 letter also involve drop-shipments to Illinois locations. The fact that your purchaser and your purchaser's customer may have done business over the Internet has no effect upon the above described sales/use tax consequences.

You also inquired about the acceptability of direct pay statements in Illinois. As a general proposition, the direct pay letters or statements described in your March 17 letter are not valid in Illinois. Recent legislation has, however, provided that certain businesses may participate in a direct payment program when the Department approves such businesses for participation. To make purchases under the program, such businesses must present to their seller a signed Form ST-46, Direct Pay Permit that has been issued by the Department. For further information see the enclosed copy of Informational Bulletin FY 2002-33.

You have also set out in your April 25 letter a situation where your purchasers have common carriers take delivery of your products at your plant location and then deliver the goods to their customers in Illinois. For transactions such as these, you would be required to charge tax if your plant is located in Illinois, unless an exemption (e.g. resale) can be documented. If the plant is located outside of Illinois, you as the first seller would not be required to collect Illinois tax, but the second seller (your purchaser) would be required to collect and remit Illinois tax if it falls under the definition of a retailer maintaining a place of business in this State, as referenced above.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Karl W. Betz  
Associate Counsel

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Enc.